U.F.C.W. Local No. 401 v. Old Dutch Foods Ltd.

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Introduction

The 2009 decision of the Alberta Labour Relations Board ("the Board") in *United Food and Commercial Workers Union, Local No. 401 v. Old Dutch Food Ltd.*,[1] resulted in a significant change to the Alberta *Labour Relations Code*.[2] The issues the United Food and Commercial Workers Union, Local 401 ("the Union") brought before the Board against Old Dutch Foods Ltd. ("the Employer") were threefold:

1. The omission of the Rand formula[3] in the *LRA* is a violation of section 2(d) of the *Canadian Charter of Rights and Freedoms*.[4]
2. The Employer did not make every reasonable effort to bargain in good faith, which resulted in a bargaining impasse and a subsequent breach of section 60(1)(b) of the *LRA*.
3. Statements to employees with respect to retroactive pay resulted in a violation of the Employer bargaining in bad faith and committing an unfair labour practice contrary to section 148(1)(a)(ii).[5]

This case comment will focus on the areas the Union brought to the Board's attention. First, the Board's reasons with respect to the ruling that the exclusion of the Rand formula is a violation of section 2(d) of the *Charter*. I agree with the decision rendered by the Board. Second, the Board's reasons with respect to the ruling that the Employer did not make every reasonable effort to engage in good faith bargaining. I do not agree with this decision of the board. Third, the Board's reasons with respect to the ruling that

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[1] [2009] A.L.R.B.D. No. 56 [*ODF*].
[2] R.S.A. 2000, c. L-1 [*LRA*].
[3] The "Rand formula", also known as an automatic check-off, is a workplace situation where payment of union dues occurs automatically regardless on whether the employee is a member of the union.
[4] s. 15, Part I of the *Constitution Act, 1982,* being Schedule B to the *Canada Act 1982* (U.K.), 1982, c.11 [*Charter*].
[5] *ODF*, *supra* note 1 at 1.

the Employer did not engage in bad faith bargaining. I agree with the decision of the board.

Background

Before looking critically at the decision of *ODF*, we must look at the law prior to examine its progression. The most significant case discussed by the Board in *ODF* is *Health Services and Support – Facilities Subsector Bargaining Assn. v. British Columbia*.[6] The Supreme Court of Canada directly tackled the question of whether section 2(d) of the *Charter* could be extended to include collective bargaining in its interpretation of freedom of association. Prior to *Health Services*, the Supreme Court of Canada had released three concurring decisions in which it outlined why the freedom of association was not extended to collective bargaining. The decisions of *Reference re Public Service Employee Relations Act (Alta.)*,[7] *PSAC v. Canada*,[8] and *RWDSU v. Saskatchewan*[9] known as the "labour trilogy," in addition to *Professional Institute of the Public Service of Canada v. Northwest Territories (Commissioner)*[10] set forth five reasons in support of the exclusion of collective bargaining from section 2(d) of the *Charter*.

1. The right to strike and collective bargaining are "modern rights" created by "fundamental freedoms."[11] [12]
2. Recognition of a right to collective bargaining would go against the principle of judicial restraint in interfering with government regulation of labour relations.[13]

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[6] [2007] 2 S.C.R. 391 [*Health Services*].
[7] [1987] 1 S.C.R. 313 [*Alberta Reference*].
[8] [1987] 1 S.C.R. 424 [*PSAC*].
[9] [1987] 1 S.C.R. 480 [*RWDSU*].
[10] [1990] 2 S.C.R. 367 [*PIPSC*].
[11] *Alberta Reference*, *supra* note 6 at 391.
[12] *Health Services*, *supra* note 5 at 25.
[13] *Alberta Reference*, *supra* note 6 at 391.

3. The recognition of the view that the freedom of association only protects those activities performable by an individual.[14]
4. Section 2(d) was not intended to protect the "objects" or goals of an association.[15]
5. The decision in *Dunmore v. Attorney General (Ontario)*[16] overruled the previous view(s) of the court in the decisions above.[17]

The subsequent decision of the Supreme Court of Canada in *Health Services* overturned the labour trilogy, when the majority concluded it "…leads to the conclusion that s. 2(d) should be understood as protecting the right of employees to associate for the purpose of advancing workplace goals through a process of collective bargaining."[18] In *Health Services*, the Supreme Court of Canada followed its decision in *Dunmore* where the court indicated, "...as I see it, the very notion of 'association' recognizes the qualitative differences between individuals and collectives."[19] The court continued by indicating the exclusion of collective bargaining "…would surely undermine the purpose of s. 2(d), which is to allow the achievement of individual potential through interpersonal relationships and collective action."[20]

Going forward, the Ontario Court of Appeal in *Fraser v. Ontario (Attorney General)*[21] noted the combined effect of *Dunmore* and *Health Services* is to recognize that section 2(d) protects the rights of workers to organize and to engage in meaningful collective bargaining. Furthermore, the court also indicated governments, in certain circumstances, would have a positive obligation to enact legislation that would

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[14] *PIPSC*, *supra* note 9 at 402-403.
[15] *Ibid* at 391-393.
[16] [2001] 3 S.C.R. 1016 [*Dunmore*].
[17] *Health Services*, *supra* note 5 at 32.
[18] *Ibid* at 87.
[19] *Dunmore*, *supra* note 15 at 17.
[20] *Ibid*.
[21] [2008] O.J. No. 4543 [*Fraser*]. Note the Fraser decision is currently under appeal to the Supreme Court of Canada.

encompass those groups deemed vulnerable.[22] A positive obligation test, first outlined in *Dunmore*, was expanded in *Baier v. Alberta*,[23] which sought to answer five questions:

1. Are the activities for which the appellants seek section 2(d) protection associational activities?
2. Are the appellants seeking a positive entitlement to government action, or simply the right to be free from government interference? If the former, then the so-called "*Dunmore* factors" must be considered.
3. Are the claims grounded in a fundamental freedom protected by section 2(d), rather than in access to a particular statutory regime?
4. Have the appellants demonstrated that exclusion from a statutory regime has the purpose or effect of substantially interfering with the freedom to organize or the right to bargain collectively?
5. Is the government responsible for the inability to exercise the fundamental freedom?[24]

Additionally, prior to *ODF*, Alberta was one of only four provinces (others include Prince Edward Island, New Brunswick, and Nova Scotia) that did not legislate a minimum level of union security.[25] After the decisions of *Dunmore* and *Health Services*, the door was opened for a decision such as *ODF* to provide for the inclusion of a Rand formula within the meaning of section 2(d) of the *Charter*.

The second and third issues surround sections 60(1)(b) and 148(1)(a)(ii), are established principles of the *LRA*, and as such, the focus was a matter of interpreting the facts before the Board and comparing them to the Board's interpretation of *Health Services*. With the potential inclusion of the Rand formula, the Board could now use this to help resolve how the Employer was bargaining.

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[22] *Ibid* at 52.
[23] [2007] 2 S.C.R. 673 [*Baier*].
[24] *Ibid* at 30.
[25] *ODF*, *supra* note 1 at 32.

Board's Opinion

I. Inclusion of the Rand Formula & section 2(d) of the *Charter*

The primary issue the Union raised before the Board revolved around the exclusion of the Rand formula from the *LRA*. In deciding this, the Board had a number of decisions as a basis to draw upon. Recently decided cases such as *Dunmore*, *Health Services*, *Fraser*, and *Baier* all provided a framework for the Board to render its decision on the exclusion of the Rand formula. In deciding whether Alberta should legislate a Rand formula the Board relied, in part, on the five questions as outlined in *Baier*. In answering the first question, the Board indicated, "…joining together to pursue collective activities and to engage in collective bargaining are associational activities…"[26] passing the first requirement. Second, the Board said the Union was seeking to have a positive entitlement placed upon the government; as such the three *Dunmore* factors will need to be considered. Third, the Board outlined as a result of *Dunmore*, "we are of the opinion that the claims of the Union…are grounded in the fundamental freedom of association rather than in a denial of access to a process founded only in the *Code*."[27] Fourth, the Board accepted the Union's claim that the *LRA* "…is underinclusive because it fails to provide adequate statutory protection to enable it…to engage in meaningful collective bargaining…substantially interfere[ing] with the fundamental freedom of association."[28] In final question, the Board agreed with the Alberta Attorney General (listed as an interested party) by indicating the absence of a Rand formula does not preclude the collective bargaining process. The Board indicated (from *Fraser*) "a government actor

[26] *Ibid* at 59.
[27] *Ibid* at 61.
[28] *Ibid* at 62.

could not be held responsible for the inability of workers to exercise their s. 2(d) rights against private employers."[29] However, taken in its totality, the *Baier* test does layout a strong argument that "a statutory Rand formula does not guarantee the outcome of collective bargaining about workplace issue[s] but it does preserve the integrity of the collective bargaining process."[30]

Taking the *Baier* test one step further was the Board's discussion on whether their decision should legislate the Alberta government to adopt a Rand formula within the *LRA*. The Board was of the view the door was opened to allow for protection, and as a result of the lack of inclusion of the Rand formula in the *LRA*, it was a violation of the *Charter* that could only be remedied by legislative action.[31] In its decision the Board indicated, "[t]he union has demonstrated to our satisfaction that this absence is solely attributable to government and is a violation of the fundamental right of these workers under s. 2(d) right to bargain collectively."[32] The Board also considered that the Alberta Attorney General did not bring forward any arguments as to why the breach would have been justified under section 1 of the *Charter*.[33]

II. Section 60(1)(b) Complaint

The Union is arguing the Employer failed to bargain in good faith by not making every reasonable effort to conclude a collective agreement by bargaining a Union security clause to an impasse.[34] As a result of the Board's decision, the section 2(d) argument "can no longer be considered an issue capable of being the subject of collective

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[29] *Fraser*, *supra* note 20 at 103.
[30] *ODF*, *supra* note 1 at 64.
[31] *Ibid* at 67.
[32] *Ibid*.
[33] *Ibid* at 73.
[34] *Ibid* at 1.

bargaining."[35] Additionally, the Board said "in light of *Health Services*, the refusal by ODF to argue to a Rand formula is now considered by the Board to be a failure to bargain in good faith,"[36] resulting in a violation of section 60(1)(b).

III. Section 148(1)(a)(ii) Complaint

The Union's final argument centred on a March 2009 letter, where the Employer indicated that should employees not accept a Final Offer before April 15, 2009, the retroactive pay for employees would become unavailable. The Union argued the letter submitted to employees constituted an interference with the representation of its members; however, the Board disagreed and dismissed the claim.

Analysis

I. Inclusion of the Rand Formula & section 2(d) of the *Charter*

While examining the issues as outlined by the Union, the Board rightly focused the majority of its effort on the question of whether the exclusion of a Rand formula in the *LRA* constituted a violation of section 2(d) of the *Charter*. The crux of this decision centred on the recent cases of *Health Services, Fraser, Baier*, and to a lesser extent, *Dunmore*.

The Board's ruling will have a profound impact in the area of labour and employment law in Alberta, and potentially stretching to New Brunswick, Nova Scotia, and Prince Edward Island. The Board now clearly indicates the inclusion of a Rand formula eliminates the Employers preference of an open shop in collective bargaining.[37]

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[35] *Ibid* at 70.
[36] *Ibid* at 73.
[37] An "open shop" is a place of employment where employees are not required to support a union as a condition of employment.

Although *ODF* is not binding in other provincial jurisdictions, there is a large entrance for which other board members to walk through in accordance with this decision.

With the ability to collect dues from all employees, whether or not they join the union is likely to have a profound impact on union coffers, which in turn will allow for unions to better represent their members. The Board rightly outlines the Employer has had successful collective agreements in Winnipeg, Manitoba; and Lachine, Quebec; where union security is legislatively guaranteed.[38] Although Alberta has historically rejected a compulsory check-off of union dues, other provinces and federally legislated corporations regulated under the *Canada Labour Code*[39] have been operating under its umbrella since Justice Rand's decision in *Ford Motor Company of Canada Limited v. International Union of United Automobile, Aircraft and Agricultural Implement Workers of America.*[40]

The Board clearly indicates there is "empirical evidence…appears to exist to support the fact the lack of a statutory Rand formula is one causal factor that contributes significantly to lowered rates of union membership in Alberta."[41] The effect of the decision is not to promote a pro-union state within Alberta. There is an age-old mantra that states, there is power in numbers. Employers rightfully know unions with weak or low membership have an equally reduced position with respect to collective bargaining. The board seeks to rectify this in the case at bar, although the Board does indicate *ODF* is not about low union membership in Alberta,[42] rather the inclusion of a Rand formula will

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[38] *ODF*, *supra* note 1 at 67.
[39] R.S., 1985, c. L-2 [*CLC*].
[40] (1946) C.L.L.R. 18,001 [*Ford*].
[41] *ODF*, *supra* note 1 at 56.
[42] *Ibid*.

have a "…salutary effect by reducing what are often lengthy periods of collective bargaining…"[43]

Additionally, the Board indicated the implementation of a Rand formula would be virtually cost free to the employer.[44] However, I believe the Board missed an opportunity to speak to the importance of cost effectiveness in labour relations. The Board did not touch on how such a system can benefit both parties during the collective bargaining phase. It is only assumed the Union and the Employer want to avoid a strike or lockout situation, while furthermore, it is legislated that both enter collective bargaining in an effort to reach an agreement.[45] It would only make sense then for a Rand formula to be in place to avoid situations where there is a power imbalance. The Union outlines,

> a balanced principle of fair representation is to operate in conjunction with the majoritarianism and exclusivity principles and is necessary to facilitate industrial peace and stability and to decrease the number and volatility of industrial disputes.[46]

As such, the balanced approach provided by a Rand formula could result in increased negotiations and efforts to resolve impasse, as opposed to hard bargaining by either side. In turn, the result is a collective agreement that is negotiated faster, which could decrease the amount of lost production seen in strike or lockout situations.

II. Section 60(1)(b) Complaint

The Union brought forward a second complaint centring on the Employers unwillingness to make every effort to bargain in good faith, resulting in negotiations coming to an impasse violating section 60(1)(b) of the *LRA*. The Board accepted the

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[43] *Ibid*.
[44] *Ibid*.
[45] *LRA*, *supra* note 2 at s. 60(1)(a)-(b).
[46] *ODF*, *supra* note 1 at 53.

position of the Union indicating "the effect of *Health Services* is such that no longer is it possible to accept as a blanket statement that union security can be the subject of collective bargaining in Alberta."[47] The Board went further by indicating

> …it is only those forms of union security greater than the Rand formula, such as a union shop or closed shop that remains subject to collective bargaining...section 2(d)…can no longer be considered an issue capable of being the subject of collective bargaining.[48]

With respect to the learned Board members, I do not agree with this analysis. The application of the law up to this point was such that Alberta was in operation without a Rand formula. As such, on its face it appears as if the argument presented by the Union had not previously been tested much less adopted by the Alberta Labour Relations Board. How can the inclusion of the Rand formula in the case at bar, be turned to be used against the Employer to determine a section 60(1)(b) violation? The Board maintains, "in light of *Health Services*, the refusal by ODF to agree to a Rand formula is now considered by the Board to be a failure to bargain in good faith."[49] It appears as if the Board is taking the decision of *Health Services* and applying the principle retroactively. Again, I do not feel this is the correct method for interpreting the decision. The correct way to apply *Health Services* in conjunction with the Board's holding in *ODF* would be to apply this principle to all future cases. I find it hard to reconcile how the Employer can be found to be in violation of section 60(1)(b) from January 2008 – April 2009, when the Board had only ruled on the inclusion of the Rand formula in November 2009.

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[47] *Ibid* at 70.
[48] *Ibid*. A "closed shop" is where upon hire an employer agrees to only hire union members and they must remain in the union for employment purposes. A "union shop" is similar to a "closed shop" but the employer can hire non-union members, who must then agree to join the union for employment purposes.
[49] *Ibid* at 73.

In addition, the Board indicates the Employer "failed to make 'every reasonable [effort] to enter into a collective agreement.'"[50] Factually this is simply incorrect. There was a series of correspondences between the Union and the Employer between January 2008 and April 2009. In these correspondences, both the Union and the Employer presented offers. The Employer maintained from the beginning it was not prepared to accept a Rand formula and "denied there was any failure on its part to bargain in good faith as prior decisions of the Board have held that union security is a bargainable issue in Alberta."[51] [52] The Board's reasoning that the Union failed to "make every reasonable effort to enter into a collective agreement"[53] should mean the Employer must be willing to accept a Rand formula in light of the decision of the case at bar. I disagree with the Board's rationale behind this, and would submit the Employer was only engaged in hard bargaining as they had previously engaged in since 1971. A strict interpretation of the statute would recognize that the Employer made efforts on numerous occasions. As such, I fail to comprehend how the Board can reason that the Employer was in violation of section 60(1)(b) of the *LRA*.

III. Section 148(1)(a)(ii) Complaint

The Union brought forward a third issue for the Board to deal with. The Union alleges the letter dated, March 19, 2009, amounted to an unfair labour practice within the meaning of section 148(1)(b)(ii). The Union alleged the "…statement is evidence of an 'anti-union posture' on the part of ODF and thus constitutes interference by ODF in the

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[50] *Ibid*.
[51] *Ibid* at 3.
[52] [2006] Alta. L.R.B.R. 276 [*AUPE*].
[53] *LRA*, *supra* note 2 at s. 60(1)(b).

Union's representation of the employees."[54] The Board held the "…statement was not a misrepresentation of the contents of the Final Offer…"[55] The Board further opined that "the views expressed by ODF were not of the sort that would otherwise be found to be impermissible."[56] I concur with the Board's analysis of this issue, but would add the Employer's letter of March 19, 2009 was likely the result of a hard bargaining and a collective bargaining process that had been unresolved for fifteen months.

Conclusion

The Board's decision in *ODF* was a historic case for labour law in Alberta. Facing a series of recent decisions that struck down the principles of the labour trilogy, the Board had been provided the groundwork for the inclusion of the Rand formula within section 2(d) of the *Charter*. Additionally, two complaints by the Union centred on sections 60(1)(b) and 148(1)(b)(ii) respectively.

First, the Board correctly decided the recent decisions that struck down the labour trilogy equated for the inclusion of the Rand formula within *LRA*. Although the decision was suspended, the possibility exists for provinces that do not legislate a Rand formula to follow suit. Additionally, the Board's decision is likely to bring the balance of power previously enjoyed by employers during the collective bargaining process to a leveller plain. Finally, although the Board did not comment on this aspect, I believe now that equal bargaining power can be achieve, it will result in a faster collective bargaining process, which in turn will lead to increased employment productivity.

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[54] *ODF*, *supra* note 1 at 75.
[55] *Ibid*.
[56] *Ibid*.

Second, the Board moved to dismiss the Union's complaint that the Employer violated section 60(1)(b). I maintain the Board misinterpreted the case at bar in two ways. First, the Board is retroactively applying *Health Services* to justify the violation of section 60(1)(b). Secondly, the Board engaged in an interpretation that held the Employer failed to maintain good faith negotiations with the Union. I argue that a strict interpretation of the statute would result in an error in the Board's reasoning on the Union's efforts.

Third and finally, the Board rightfully dismissed the section 148(1)(b)(ii) claim of the Union. I agree with the Board's decision that the letter of March 19, 2009 did not purport to have any misrepresentation. Additionally, I would go further to indicate that the letter was grounded in the principle of hard bargaining.

Consequently, although there are two ancillary issues at play in *ODF*, the ultimate decision by the Board was the correct one, and resulted in not only an advancement of the case at bar, but also the progression of labour law in Canada.